

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 1

BROWN COUNTY

PETERS SERVICE CENTER, INC.,

Petitioner,

V.

Case No. 95-CV-924

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

NOTICE OF ENTRY OF DECISION

To: Cynthia Caine Treleven  
Metzler & Hager, S.C.  
222 Cherry Street  
Green Day, Wisconsin 54301-4223

PLEASE TAKE NOTICE that a decision denying petitioner's request for relief and motion for an order to show cause, of which a true and correct copy is hereto attached, was signed by the court on the 21st day of November, 1995, and duly entered in the Circuit Court for Brown County, Wisconsin, on the 22nd day of November, 1995.

Notice of entry of this decision is being given pursuant to secs. 8B6.06(5) and 808.04(1), Stats.

Dated this 4th day of December, 1995.

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Attorney General

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State Bar No. 1009882

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STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH

COUNTY OF BROWN

Peters Service Center, Inc.,

Petitioner,

DECISION

-vs-

Department of Industry, Labor and Human  
Relations,

Case No. 95-CV-924

Respondent.

According to the briefs and supporting documents filed in this matter, at some point prior to May 2, 1995, Petitioner submitted to the Department of Industry, Labor and Human Relations (hereinafter 'DILHR') a request for Petroleum Environmental Cleanup Fund (PECFA) eligibility.<sup>1</sup> In a letter addressed to Petitioner's counsel (Ms. Cynthia Caine Treleven) dated May 2, 1995, DILHR denied Petitioner's request for PECFA eligibility. Throughout the month of May 1995, Ms. Treleven had been experiencing blurred vision in her right eye and on May 30, 1995 was diagnosed as suffering from an eye condition requiring immediate surgery. For several days following the diagnosis, Ms. Treleven became understandably immersed in the arrangement of necessary logistical preparations as to matters regarding the impending surgery.

On June 1, 1995, Ms. Treleven mailed an appeal of DILHR's May 2, 1995 denial of PECFA financing. A copy of the appeal was faxed to DILHR on the morning of June 2, 1995. The appeal was filed on June 2, 1995. On June 5, 1995, Mr. Howard Bernstein, DILHR's General Counsel, sent a letter to Ms. Treleven which stated that Petitioner's request for a hearing was denied

<sup>1</sup>DILHR, through its administration of PECFA, provides monetary awards to qualified persons who have incurred expenses as a result of certain environmental Cleanup activities. Wis. ADMIN. CODE § ILHR 47.01.

by DILHR due to the fact that the appeal filed by Ms. Treleven on June 2, 1995 arrived one day past the deadline for the filing of such appeals. The matter is now before this Court as a result of Petitioner's June 30, 1995 Petition for Judicial Review pursuant to § 227.42, Wis. Stats., and § 227.53, Stats.

The Petition for review of DILHR's refusal to grant a hearing on the issue of PECFA funding is property before this Court:

Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter....

§ 227.52, Stats. In conducting reviews of DILHR's decisions, the parameters of this Court's, decision-making process are circumscribed so that:

Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [§ 227.57, Stats.], it shall affirm the agency's action.

§ 227.57 (2), Stats.

The issue presented in this matter is: Whether DILHR properly refused to consider Petitioner's June 2, 1995 appeal?

1. Petitioner's Claim as to Tolling of Appeal Period

The Petitioner argues that: 'The Petitioner's appeal was timely filed in that the agency decision did not comply with § 227.48, Stats. (Brief for the Petitioner at p. 5). Petitioner would have this Court conclude that its Petition was filed in a timely fashion because DILHR did not include in its May 2, 1995 letter the name of the party 'to be named as respondent. " (Brief for the Petitioner at p. 6 citing § 227.48(2), Stats.

Section 227.48(2), Stats., requires that every agency decision include "identification of the, party to be named as respondent.' DILHR failed to state the name of such a party in its May 2, 1995 letter notifying Petitioner of DILHR's decision denying Petitioner's request for PECFA eligibility.<sup>2</sup> However, there is no authority to indicate that such a failure in and of itself somehow impairs the 'fairness of the proceedings or the correctness of the action. § 227.57(4), Stats. Further, Petitioner has not alleged that any such impairment occurred as a direct result of DILHR's omission.

I have considered Petitioner's assertion that: 'Since the May 2, 1995 PECFA ineligibility decision from DILHR did not comply with § 227.48, [sic] the time period for appealing said decision has not yet begun to run. Accordingly, Petitioner's appeal of such decision which was filed with DILHR June 2, 1995, is timely.' (Brief for the Petitioner at p. 7). However, Petitioner has not cited (and research has failed to yield) any authority for such an assertion.

<sup>2</sup>The May 2, 1995 letter states in pertinent part:

The decision, by the department, may be appealed by the claimant or DILHR approved agent in writing, and received by the department, within 30 days of the date of this letter, to:

Kristian Randal, Assistant Legal Counsel  
Office of Legal Counsel  
The Department of Industry, Labor and Human Relations  
P.O. Box 7946  
201 East Washington Avenue  
Madison, WI 53707

11. Petitioner's Motion for Hearing to Show Cause

A. DILHR's Notice of Appearance and Statement of Position

Petitioner claims that "DILHR's Notice of Appearance and Statement of Position were not timely served.' (Brief for the Petitioner at p. 8).

Section 227.53(2), Stats., states in pertinent part:

Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating that person's position with reference to each material allegation in the petition....

Petitioner argues that DILHR's service of its Notice of Appearance and Statement of Position was untimely because the proper date of service for that notice of appearance and statement was July 24, 1995 but "Petitioner's counsel received the Notice of Appearance and Statement of Position on July 25, 1995, which was the twenty-first day." (Brief for the Petitioner at pp. 7-8).

Given Petitioner's representation that the pertinent documents were received by Petitioner's counsel in the mail on July 25, 1995, it is apparent that DILHR's Notice of Appearance and Statement of Position was mailed at some point before July 25, 1995. Petitioner does not allege that the document was not mailed prior to July 25, 1995. The Wisconsin Supreme Court in Wagner v. State Medical Examining Board, 181 Wis. 2d 633, 639 (1994), applied the principle that those general rules of civil procedure not in conflict with § 227, Stats., may apply to administrative review proceedings. As to service of papers upon a party:

Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party in person is ordered by the court.... Service by mail is complete upon mailing.

01. 14(2). This rule is not in conflict with any provision of § 227, Stats.

The service of DILHR's Notice of Appearance and Statement of Position was not untimely.

B. DILHR's Untimely Filing of the Record on Review

Petitioner notes (and DILHR admits) that DILHR filed its Record on Review in an untimely fashion. (Brief for the Petitioner at p. 8); (Brief for the Respondent at p. I 1).

Section 227.55, Stats., provides in pertinent part:

Record on review. Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein....

Id. In the present case, DILHR admits that the Record on Review should have been filed by August 3, 1995 but was not filed until August 17, 1995. (Brief for the Respondent at p. 11).

Petitioner alleges that DILHR's failure to timely file the Record on Review "constitutes grounds" for setting aside its decision to deny Petitioner's right to appeal the PECFA ineligibility decision.' (Brief for the Petitioner at p. 9). Although Petitioner cites § 227.57(2), Stats., as authority for this assertion, there is nothing within § 227.57, Stats., to support the notion that an untimely filing such as that performed by DILHR in the present matter constitutes "grounds" for setting aside DILHR's decision.

In Wagner supra, the Wisconsin Supreme Court held that an agency's failure to both timely file its notice of appearance and submit an original or certified copy of the record does not empower the circuit court to grant a default judgment to [the petitioner]. The circuit court had within its discretion other remedies compatible with the ch. 227 scope of Judicial review. For example, the circuit court, upon motion or petition, could have (a) issued a writ of mandamus, ordering compliance by the [administrative agency]; (b) issued an order to show cause as to why the [administrative agency] should not be held in contempt for noncompliance; (c) ordered production of the record; or (d) refused to consider the [administrative agency's] statement of position because it failed to timely file its notice of appearance. All the aforementioned remedies would have been consistent with the purpose of § 227.57, Stats., which requires a circuit court's independent review of the record.

Wagner, 181 Wis. 2d at 644. There is nothing in the text of the Wagner decision to indicate that "setting aside" DILHR's decision would be consistent with the purpose of § 227.57, Stats.

Furthermore, DILHR has not only already provided the Record on Review, it has also filed with the Court an Affidavit of its General Counsel which states in pertinent part:

2. One of the legal services that I provide for certain cases is the preparation of the record on review in response to a petition for judicial review. The petition in this matter was received by the DILHR Secretary's Office on July 3, 1995. I promptly notified the appropriate DILHR staff of the appeal and requested the file that would be provided as the record on review.

3. Within a few days after requesting the file, I learned that several necessary documents were missing from the file and had apparently been filed incorrectly.... While a search was made for the documents, I forwarded the rest of the file to the Department of Justice on July 14, 1995.

4. The misfiled documents were located and delivered to me on or shortly before August 10, 1995. I delivered the certified copy of the record on review to the Department of Justice on August 11, 1995.

(Affidavit of DILHR General Counsel Howard 1. Bernstein at pp. 1-2). Since both the file and what appears to be a reasonable explanation for the delay have been delivered to the Court, there would be no sense in ordering either production of the record or a showing of cause as to why the record was delivered in an untimely fashion.

In light of the foregoing, it would serve no purpose for this Court to take any additional action as a result of the fifteen day delay in the production of the Record on Review.

### III. Petitioner's Claim in Equity

In the present case:

Petitioner further submits that the circumstances set forth in the facts stated above, as well as the Affidavit of Cynthia Caine Treleven ... concerning serious medical emergency at the very time when DILHR alleges that the appeal should have been filed (June 1, 1995), constitute ground for setting aside the harsh result of DILHR's decision to deny Petitioner's appeal.

(Brief for the Petitioner at p. 10). In support of this argument, Petitioner has cited that part of the Supreme Court of Wisconsin's holding in Lewis Realty, Inc. v. Wisconsin Real Estate Broker's Bd., 6 Wis. 2d 99 (1959), which states:

It is our considered conclusion that penalties, which are imposed by administrative agencies that are so harsh as to shock the conscience of the court, constitute "arbitrary" action....

Lewis Realty, 6 Wis. 2d at 125. The Court in Lewis Realty considered a factual pattern in which a penalty was imposed by an agency although there had "been no determination by the [agency] that any of [those penalized had] been guilty of any fraud, misrepresentation, double-dealing, overreaching, or any culpable or reprehensible act." Lewis Realty, 6 Wis. 2d at 126. The holding in Lewis is not germane to the present matter.

It should not go without mention that were the present case one involving a matter commenced as a civil action in circuit court, it is likely that Petitioner would prevail on a claim of excusable neglect made pursuant to § 801.15, Stats.<sup>3</sup> The facts of the present case relating the plight suffered by Petitioner's counsel are facts which compel empathetic sympathy. Who among us has not at some point been confronted with one of those unexpected emergencies which are part and parcel of the human condition and which at the time of occurrence require one's complete and undivided attention? It is apparent that Petitioner's counsel acted reasonably under the circumstances which she was enduring at the time the appeal deadline expired in this matter. See Hedtcke v. Sentry Insurance Co., 109 Wis. 2d 461, 468 (1982) (stating excusable neglect is neglect which may have been the act of a reasonably prudent person under the circumstances).

<sup>3</sup>Section 801.15, Stats., states in pertinent part:

When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms.... If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect.

§ 801.15(2)(a), Stats.



However:

Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where different procedure is prescribed by statute or rule.

§ 801.01(2), Stats. Since the appeal in this matter was denied as part of the administrative proceedings before DILHR and not as part of a civil action or special proceeding in circuit court, I am precluded from properly entertaining a claim of excusable neglect in this matter. See Chevrolet Division, G.M.C. v. Industrial Commission, 31 Wis. 2d 481, 489 (1966) (interpreting the statutory predecessor to § 801.01, Stats., to indicate that rules of civil procedure apply only to judicial actions or proceedings).

There is no authority of which this Court is aware which would allow it to relieve Petitioner from the effects of DILHR's decision on the ground of medical emergency.

For the foregoing reasons, Petitioner's request for relief and Motion for an Order to Show

Cause are DENIED.

Dated at Green Bay, Wisconsin, this 21 day of November, 1995.

BY THE COURT

Honorable Richard G. Greenwood  
Circuit Court, Br. I